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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 AEGIS COUNCIL, LLC,)
9 Plaintiff,) 3:10-cv-00756-RCJ-RAM
10 v.) **ORDER**
11 MALDONADO *et al.*,)
12 Defendants.)
13
14

15 This case arises out of a claim for either defamation or business disparagement¹ filed by
16 Plaintiff/Counter-Defendant Aegis Council, LLC (¶Plaintiff¶) in Nevada state court and removed
17 by Defendants/Counter-Claimants Betsy Maldonado and Kevin Montgomery (¶Defendants¶) to
18 this Court. Pending before the Court are Defendants/Counter-Claimants¶ motion to dismiss
19 (ECF No. 5); Plaintiff/Counter-Defendant¶s motion for preliminary injunction and request for
20 hearing (ECF No. 7); and Plaintiff/Counter-Defendant¶s motion to dismiss the counterclaims or,
21 in the alternative, for a more definite statement (ECF No.12). For the reasons given herein, the
22 Court DENIES both motions to dismiss and DENIES the motion for preliminary injunction.

23 **I. FACTS AND PROCEDURAL HISTORY**

24 Plaintiff Aegis Council, LLC filed a verified complaint in this action in the Second
25 Judicial District Court of Nevada on November 18, 2010. (Compl., ECF No. 1-2 at 1).
26

27 ¹ In its reply brief for its motion for preliminary injunction, Plaintiff for the first time identifies that its claim is for
28 ¶business disparagement¶ rather than defamation. (ECF No. 18 at 3). Plaintiff concedes that, in briefing, both
parties have been addressing a claim for defamation. *Id.* Plaintiff avers that it satisfies the elements of either
defamation or business disparagement. *Id.*

1 According to the complaint, Plaintiff is a Colorado company with a principal place of business at
 2 155 Cadillac Place, Reno, Washoe County, Nevada. *Id.* Defendants Betsy Maldonado and
 3 Kevin Montgomery are individuals residing in Belmont, California. *Id.*

4 According to the complaint, Defendants, using the alias Bam Bam, began publishing to
 5 third parties, including all persons with access to the internet, on the internet website
 6 RipoffReport.com, false and defamatory statements of and concerning the Plaintiff. *Id.* at 2.
 7 These statements included, *inter alia*, öThat Aegis Council offers a tax avoidance scamö; öThis
 8 group of people is bilking millions of dollars from unsophisticated and sophisticated investors
 9 nationally selling this tax avoidance schemeö; öThe fraud is simpleö; öAegis Shield is a fraud. It
 10 is not legal and all these companies are scammersö; öWe hope that our detailed complaint will
 11 stop these predators from financially destroying other middle and high income American
 12 families nationallyö; and öIf you, and I mean Aegis Council and all the 8 various companies, are
 13 legitimate companies you will move forward with selling our Aegis Shield hedge to another
 14 buyer and return our money (with or without additional broker charges). If you are not
 15 legitimate companies you will litigate and bully even more than you already have a consumer
 16 whom you have literally taken every last dime from (rape).ö *Id.*

17 Although the cause of action is not specifically identified, the gravamen of the complaint
 18 is either business disparagement or defamation seeking a temporary restraining order,
 19 preliminary and permanent injunctions, damages, and other relief. *Id.* at 264. Defendants filed
 20 five counterclaims against Aegis Council. (*See* Am. Answer and Countercl., ECF No. 1-6).
 21 Defendants removed based on diversity of citizenship (Notice of Removal, ECF No. 1) and have
 22 now moved for dismissal for lack of personal jurisdiction and improper venue or, in the
 23 alternative, transfer of venue to the öDistrict of California, San Francisco Divisionö [sic]
 24 pursuant to 28 U.S.C. § 1404(a). (*See* Mot. to Dismiss, ECF No. 5 at 1, 5). Plaintiff filed an
 25 opposition to the motion (Pl.ö Oppn to Defs.ö Mot to Dismiss, ECF No. 11) to which
 26 Defendants filed an untimely reply. (*See* Defs.ö Reply in Supp. of Mot. to Dismiss or for Change
 27 of Venue, ECF No. 14).
 28

1 Plaintiff filed a renewed motion for preliminary injunction, originally filed in state court
 2 prior to removal.² (Pl.ø Mot. for Prelim. Inj. & Req. for Hrg, ECF No. 7 at 2). Defendantsø
 3 opposition was untimely filed. (See Oppø to Mot. for Prelim. Inj., ECF No. 13). Plaintiffø
 4 reply was likewise untimely. (See Reply in Supp. of Mot. for Prelim. Inj., ECF No. 18).

5 Subsequently, Plaintiff/Counter-Defendantø filed a motion to dismiss the counterclaims
 6 or, in the alternative, for a more definite statement (ECF No.12). Additionally,
 7 Defendants/Counter-Claimants filed a second amended answer, counterclaims and jury demand
 8 in this Court. (ECF No. 25).

9 II. ANALYSIS

10 A. Motion to Dismiss / Motion to Transfer (ECF No. 5)

11 A defendant may move to dismiss for lack of personal jurisdiction before answering.
 12 FED. R. CIV. P. 12(b)(2). Removal to federal court does not waive this defense. *Morris & Co. v.*
 13 *Skandinavia Ins. Co.*, 279 U.S. 405, 409 (1929). Under Rule 12, a party may also move for
 14 dismissal for improper venue. FED. R. CIV. P. 12(b)(3). In the alternative, a defendant may
 15 move for a change of venue in an action removed to federal court for the convenience of parties
 16 and witnesses. *See* 28 U.S.C. §§ 1404(a), 1441(a) (2006).

17 i. Personal Jurisdiction

18 öAfter removal, the federal court øtakes the case up where the [s]tate court left it off.ø
 19 *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 436 (1974) (citation
 20 omitted). The Federal Rules of Civil Procedure apply to a civil action after it has been removed
 21 from state court. FED.R.CIV.P. 81(c)(1). Upon removal, a defendant may assert any defense that
 22 would have been available to him in state court unless it has been lost because it was not
 23 interposed as prescribed by either Rule 12(g) or 12(h). 5C Charles Allen Wright & Arthur R.
 24 Miller, *Federal Practice and Procedure* § 1395, at 558 (3d ed. 2004).

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 27 ² Plaintiff submits that a bond amount of \$1500.00 is adequate in this case and indicates that such amount has
 28 already been posted with the Clerk of the Second Judicial District Court. (ECF No. 7 at 7). Defendant claims
 interference with First Amendment rights, harm to the public, and Defendantsøalleged inability to retract the
 statements and therefore seeks a øsubstantial bond.ø (ECF No. 13 at 4).

1 However, the Eighth Circuit has held that defendants are barred from asserting lack of
 2 personal jurisdiction if they have waived that right under the applicable state law. *See*
 3 *Nationwide Eng'g & Control Sys., Inc, v. Thomas*, 837 F.2d 345, 348 (8th Cir. 1988). Under
 4 Rule 12 of the Nevada Rules of Civil Procedure, the defense of lack of personal jurisdiction is
 5 waived if either omitted from a motion under certain circumstances or if it is neither made by
 6 motion under this rule nor included in a responsive pleading or an amendment thereof . . . to be
 7 made as a matter of course. N.R.C.P. 12(h)(1).

8 Here, Defendants do not raise lack of personal jurisdiction in either their original or
 9 amended complaint filed in state court. (*See* ECF No. 1-4, 1-6). Moreover, there is no indication
 10 in the record that Defendant raised this defense via motion. Defendant therefore has waived
 11 personal jurisdiction under Nevada state law and is barred from bringing the defense in this
 12 Court. Because the Court concludes that Defendants waived their personal jurisdiction defense
 13 under Nevada law, and that the waiver bars the defense here, the Court need not consider
 14 whether Defendants had sufficient minimum contacts with Nevada to satisfy due process.

15 **ii. Venue**

16 When a court makes a determination of venue under Rule 12(b)(3), the well-pled
 17 allegations of the Complaint are taken as true, and any evidence submitted by the non-movant in
 18 opposition to the Rule 12(b)(3) motion is viewed in the light most favorable to the non-movant.
 19 *Ginter ex rel. Ballard v. Belcher, Prendergast & Laporte*, 536 F.3d 439, 448649 (5th Cir. 2008).

20 Whether venue lies in a particular district is typically governed by 28 U.S.C. § 1391.
 21 However, 28 U.S.C. §1441(a) governs venue in removed actions, not § 1391. *See Polizzi v.*
 22 *Cowles Magazines, Inc.*, 345 U.S. 663, 665666 (1953) (Section 1441(a) expressly provides that
 23 the proper venue of a removed action is the district court of the United States for the district and
 24 division embracing the place where such action is pending). A party in a removed action may
 25 not challenge venue as being improper under 28 U.S.C. § 1406, but may only challenge it as
 26 being more convenient elsewhere under 28 U.S.C. §1404. *PT United Can Co. v. Crown Cork &*
 27 *Seal Co.*, 138 F.3d 65, 72673 (2d Cir. 1998). For the convenience of parties and witnesses, in
 28 the interest of justice, a district court may transfer any civil action to any other district or division

1 where it might have been brought.ö 28 U.S.C. § 1404(a) (2006). A district court has öbroad
 2 discretionö under § 1404(a). *CFTC v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979). A district
 3 court is to use a case-by-case analysis of convenience and fairness in ruling on transfer of venue.
 4 *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (citing *Van Dusen v. Barrack*, 376 U.S.
 5 612, 622 (1964)).

6 Defendants have moved for a dismissal for improper venue, or, in the alternative, a
 7 change of venue to the Northern District of California. (ECF No. 5 at 1). In their argument,
 8 Defendants misrely on 28 U.S.C. § 1391(a) to determine venue. *See id.* at 3.

9 Defendants argue that it will be övery difficultö to litigate outside their district as their
 10 files and residence are there. *Id.* at 4. Further, the defamation occurred there and ö[Plaintiff]³
 11 travelled to California to present its pitch and accepted Defendantsömoney there. . . .ö *Id.* at 465.

12 In its opposition, Plaintiff avers Nevadaö strong interest in protecting businesses such as
 13 Plaintiffö. (ECF No. 11 at 13). Further, it argues that Nevada law governs and courts in Nevada
 14 are more familiar with Nevada law. *Id.* Plaintiffös principal place of business and key witnesses
 15 are in Nevada. *Id.* Costs of litigation and access to evidence about Plaintiffös business likewise
 16 favor Reno. *Id.* Defendantsöinconvenience is mitigated by the ability öto communicate to
 17 Nevada via electronic means with great ease.ö *Id.* at 14.

18 In reply, Defendants argue that it has not been determined whether Nevada law will
 19 apply. (ECF No. 14 at 2ö3). Further, Plaintiff has a ögreat deal of contactö with Nevada
 20 whereas Defendants have little. *Id.* at 3. Defendants further argue (without authority) that the
 21 contacts related to the defamation claim are not forum specific and electronic filing under the
 22 ECF system renders court costs the same regardless of where the action is taken. *Id.* Deposition
 23 costs of the Reno witnesses will not change regardless of venue and both parties have secured
 24 counsel in Reno to take depositions. *Id.* Finally they aver that ease of access to witnesses is
 25 balanced in that there are two Defendants in California and three key witnesses in Reno. *Id.*

26 Defendants conflate venue and forum analysis, but in the end their arguments indicate
 27 that the two venues at issue are at best equally appropriate. Although three potential key

28 ³ The Motion to Dismiss incorrectly states öDefendantsö here.

1 witnesses for Plaintiff have been named, there is some indication that there may be many more.
 2 Both parties have retained counsel in Reno. On balance, laying venue in Reno, Nevada is
 3 proper. This court therefore denies the motion to dismiss for improper venue or to transfer.

4 **B. Motion for Preliminary Injunction (ECF No. 7)**

5 The Ninth Circuit in the past set forth two separate sets of criteria for determining
 6 whether to grant preliminary injunctive relief:

7 Under the traditional test, a plaintiff must show: (1) a strong likelihood of success
 8 on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary
 9 relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4)
 10 advancement of the public interest (in certain cases). The alternative test requires
 11 that a plaintiff demonstrate either a combination of probable success on the merits
 12 and the possibility of irreparable injury or that serious questions are raised and the
 13 balance of hardships tips sharply in his favor.

14 *Taylor v. Westly*, 488 F.3d 1197, 1200 (9th Cir. 2007). öThese two formulations represent two
 15 points on a sliding scale in which the required degree of irreparable harm increases as the
 16 probability of success decreases.ö *Id.*

17 The Supreme Court recently held that a plaintiff seeking an injunction must demonstrate
 18 that irreparable harm is ölikely,ö not just possible. *Winter v. NRDC*, 129 S. Ct. 365, 374 ö76
 19 (2008) (rejecting the Ninth Circuit's alternative ösliding scaleö test). The Ninth Circuit has
 20 explicitly recognized that its öpossibilityö test was ödefinitively refutedö in *Winter*, and that
 21 ö[t]he proper legal standard for preliminary injunctive relief requires a party to demonstrate öthat
 22 he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of
 23 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the
 24 public interest.ö *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting
 25 *Winter*, 129 S. Ct. at 374) (reversing a district court's use of the Ninth Circuit's pre-*Winter*,
 26 ösliding-scaleö standard and remanding for application of the proper standard).

27 A recent Ninth Circuit ruling relying largely on the dissenting opinion in *Winter* parsed
 28 the language of *Winter* and subsequent Ninth Circuit rulings and determined that the sliding scale
 test remains viable when there is a lesser showing of likelihood of success on the merits
 amounting to öserious questions,ö but not when there is a lesser showing of likelihood of
 irreparable harm. *See Alliance for the Wild Rockies v. Cottrell*, 622 F.3d 1045, 1052 ö653 (9th Cir.

1 2010). This case presents some difficulty in light of *Winter* and prior Ninth Circuit cases. To the
 2 extent *Cottrell*’s interpretation of *Winter* is inconsistent with *Selecky*, *Selecky* controls. *See*
 3 *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc) (holding that, in the absence of an
 4 intervening Supreme Court decision, only the en banc court may overrule a decision by a
 5 three-judge panel). In any case, the Supreme Court stated in *Winter* that “[a] plaintiff seeking a
 6 preliminary injunction must establish that he is *likely* to succeed on the merits, that he is *likely* to
 7 suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his
 8 favor, *and* that an injunction is in the public interest.” *Winter*, 129 S. Ct. at 374 (citations
 9 omitted) (emphases added). The test is presented as a four-part conjunctive test and the word
 10 “likely” modifies the success-on-the-merits prong in exactly the same way it separately modifies
 11 the irreparable-harm prong. In rejecting the sliding-scale test, the *Winter* Court specifically
 12 emphasized the fact that the word “likely” modifies the irreparable-injury prong, *see id.* at 375,
 13 and the word modifies the success-on-the-merits prong the same way, *id.* at 374.

14 In summary, to satisfy *Winter*, a movant must show that he is “likely” to succeed on the
 15 merits. “Likely” means “having a high probability of occurring or being true.” Merriam-
 16 Webster Dictionary, <http://www.merriam-webster.com/dictionary/likely>. Black’s defines the
 17 “likelihood-of-success-on-the-merits test” as “[t]he rule that a litigant who seeks [preliminary
 18 relief] must show a reasonable probability of success” *Black’s Law Dictionary* 1012 (9th
 19 ed. 2009).

20 **i. Likelihood of Success**

21 Plaintiff does not specifically identify the cause of action in its complaint, but it
 22 essentially averred the elements of a defamation claim. (See ECF No. 1-2). Plaintiff confirmed
 23 this in its Motion for Preliminary Injunction where it claims “the Right to Injunctive Relief for
 24 Defamation of An Ongoing Business.” (ECF No. 7 at 3). In its reply, Plaintiff has since
 25 conceded that the parties have treated the claim as one for defamation. (ECF No. 18 at 3).
 26 Plaintiff now correctly claims that the action is properly one for business disparagement. *Id.*

27 Statements accusing an individual of personal misconduct in his or her business or
 28 attacking the individual’s business reputation may be brought as an action for defamation per se.

1 *Clark Cnty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 213 P.3d 496, 504 (Nev. 2009). However,
 2 if the statements are directed towards the quality of the individual's product or services, the
 3 claim is one for business disparagement. *Id.* The elements of business disparagement are: (1) a
 4 false and disparaging statement,[] (2) the unprivileged publication by the defendant, (3) malice,
 5 and (4) special damages.⁴ *Id.* The key difference between business disparagement and
 6 defamation is that for a claim of business disparagement to lie, the plaintiff must prove malice
 7 and special damages. *Id.* Malice is shown where plaintiff can prove that defendant published a
 8 disparaging remark with the intent to cause harm to the plaintiff's pecuniary interests, or the
 9 defendant published a disparaging remark knowing its falsity or with reckless disregard for its
 10 truth. *Id.* at 504-05. As to damages, plaintiff must prove special damages and show that
 11 defendant's disparaging remarks were the proximate cause of the economic loss. *Id.* at 505. The
 12 plaintiff may bring evidence of general business decline, but it must show that the business
 13 decline was the result of the disparaging remarks and must eliminate other causes.⁵ *Id.*

14 As evidence, Plaintiff presents the declarations of Mark Wray and Stephanie Olsen
 15 incorporated into its motion. (Decl. of Mark Wray, Dec. 14, 2010, ECF No. 7 at 869); (Decl. of
 16 Stephanie Olsen, Dec. 14, 2010, ECF No. 7 at 10611). Plaintiff also relies on its verified
 17 complaint. (ECF No. 1-2). Plaintiff avers that on or about October 27, 2010, Defendants began
 18 publishing false and defamatory statements on the website RipoffReport.com without privilege
 19 regarding its business. (ECF No. 1-2 at 2). Exemplary statements are presented in Plaintiff's
 20 verified complaint and repeated in their motion for preliminary injunction. (ECF No. 1-2 at 2);
 21 (ECF No. 7 at 566, 11). In her declaration, Stephanie Olsen provides background on Plaintiff's
 22 program and services and Plaintiff's interactions with Defendants. (ECF No. 7 at 10). Ms.
 23 Olsen then states she has read Defendants' postings on RipoffReport.com concerning Plaintiff

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25 ⁴ In contrast, the elements of defamation are: (1) a false and defamatory statement by defendant concerning the
 26 plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual
 27 or presumed damages. See *Chowdry v. NLVH, Inc.*, 851 P.2d 459, 462 (Nev. 1993). If the defamation tends to
 injure the plaintiff in his or her business or profession, it is deemed defamation per se, and damages will be
 presumed. *Id.*

28 ⁵ In contrast, to show defamation per se, plaintiff must only show some evidence of fault amounting to at least mere
 negligence and damages are typically presumed except under limited circumstances. *Clark Cnty. Sch. Dist.*
v. Virtual Educ. Software, Inc., 213 P.3d at 504-05.

1 and declares that ~~each~~ [of the statements] is false and defamatory as set forth in [the] Verified
 2 Complaint. *Id.* at 10611. She further declared that ~~this~~ investment is not a scam and is not
 3 fraudulent. *Id.* at 11. Damages in excess of \$10,000 are claimed. (ECF No. 1-2 at 3).

4 In opposition, Defendants argue that Ms. Olsen's declaration is conclusory and does not
 5 establish that Defendants' alleged statements are false.⁶ (ECF No. 13 at 2). Defendants further
 6 object on evidentiary grounds in that Ms. Olsen's statements about the website are hearsay
 7 within hearsay and failure to present printouts of the actual website violates the best evidence
 8 rule. (ECF No. 13 at 2). These objections are unpersuasive. Though supporting pages from the
 9 RipoffReport.com website were not attached to the motion for preliminary injunction (ECF No.
 10 7), they are attached to Plaintiff's opposition to the motion to dismiss (ECF No. 11) and are thus
 11 before this Court. (See ECF No. 11-4).

12 Defendants credibly argue that the alleged postings on RipoffReport.com are puffery or
 13 statements of opinion which cannot reasonably be determined to be false. Even statements of
 14 legal import such as ~~Aegis~~ Shield is a fraud and ~~It~~ is not legal are not declared with such
 15 specificity to reasonably determine their truth or falsity. *Cf. Coastal Abstract Serv., Inc. v. First*
 16 *Am. Title Ins. Co.*, 173 F.3d 725, 731 (9th Cir. 1999) (~~Absent~~ a clear and unambiguous ruling
 17 from a court or agency of competent jurisdiction, statements by laypersons that purport to
 18 interpret the meaning of a statute or regulation are opinion statements, and not statements of
 19 fact). Plaintiff provides virtually no independent facts to aid the Court in determining the
 20 falsity of the alleged postings. Further, Plaintiff provides no specific evidence linking either its
 21 alleged damages or a general business decline to the alleged ~~false~~ and defamatory statements made
 22 by Defendants. In short, Plaintiff has not shown that it would be likely to succeed either
 23 on a claim of defamation per se (even if it applied here) or even less so on a claim of business
 24 disparagement.

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 28 ⁶ Defendants further state that attribution of the alleged defamatory statements to Defendants is unclear in Ms. Olsen's declaration. (ECF No. 13 at 2). In this, they may be correct. However attribution is properly stated in Plaintiff's verified complaint. (See ECF No. 1-2 at 2).

1 Evidence presented by Plaintiff in support of its claim is conclusory at best and does not
 2 substantially establish a likelihood of success on the merits. As such, the preliminary injunction
 3 fails as to this factor without further analysis. However, the Court will address the other factors.

4 **ii. Irreparable Injury**

5 The right to carry on a lawful business without obstruction is a property right, and acts
 6 committed without just cause or excuse which interfere with the carrying on of plaintiff's
 7 business or destroy its custom, its credit or its profits, do an irreparable injury and thus authorize
 8 the issuance of an injunction. *Guion v. Terra Marketing of Nevada, Inc.*, 523 P.2d 847, 848
 9 (Nev. 1974). However, publication of unjust and malicious matter will not be restrained simply
 10 upon a showing of its falsity. *Id.* Equity will, however, restrain tortious acts where it is
 11 essential to preserve a business or property interests and also restrain the publication of false and
 12 defamatory words where it is the means or an incident of such tortious conduct. *Id.*

13 Plaintiff asserts that continued publication of the alleged defamatory statements will
 14 cause irreparable harm in that the statements are targeted towards Plaintiff's business and state
 15 that the business is a fraud. (ECF No. 7 at 6). Defendants counter that loss of business is
 16 compensable with damages. (ECF No. 13 at 3).

17 Although Plaintiff relies on *Guion*, the conduct at issue in that case is distinguishable. In
 18 that case, the appellant, Mr. Guion, had a falling out with an alleged representative of the
 19 appellee. *Guion*, 523 P.2d at 847. Mr. Guion subsequently displayed several signs, some of
 20 which were attached to his car, in front of appellee's business location which stated, "A Terracor
 21 representative threatened to kill me! What next, Rick Johnson. I regret having done business
 22 with a Terracor representative. Doing business with a Terracor representative introduced me to a
 23 new low in ethics." *Id.* There, the court found sufficient irreparable injury to affirm preliminary
 24 injunction against the appellant. *Id.* at 848.

25 Here, however, Defendants' statements are displayed on a website specifically designed
 26 for remarks from unsatisfied clients and customers. There is no showing that Defendants are
 27 displaying their statements at Plaintiff's business or at its client seminars. While it is
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1 conceivable that some irreparable injury may be suffered by Plaintiff's company, this factor at
 2 most tips only slightly in favor of Plaintiff.

3 **iii. Balance of Hardships**

4 Plaintiff asserts that (potential) business loss from Defendants' statements weighs the
 5 balance of hardships in its favor. (ECF No. 7 at 6). There is no corresponding hardship in
 6 preventing Defendants from defaming Plaintiff. *Id.* Defendants do not directly address balance
 7 of hardships, but they do state that the owner of the website at issue has set it up such that it is
 8 impossible to remove the offending language.⁷ (ECF No. 13 at 3); (Decl. of Betsy Maldonado,
 9 Jan, 4, 2011, ECF No. 13-1). To the extent that Plaintiff can show the potential for business loss,
 10 the balance of hardships weighs in Plaintiff's favor.

11 **iv. Advancement of the Public Interest**

12 Defendants argue that injunctive relief in this case impinges on their Constitutional right
 13 of free speech and consumer education. (ECF No. 13 at 3). While such arguments are not an
 14 absolute bar to a claim of defamation or business disparagement, it is not necessary to reach First
 15 Amendment issues where the preliminary injunction motion fails on other grounds.

16 While the potential for injury to reputation and balance of hardships tend to weigh
 17 slightly in Plaintiff's favor, Plaintiff has not established likelihood of success on the merits based
 18 on evidence presented in its motion and verified complaint. Short of making defamatory
 19 statements, Defendants are entitled to their opinion and their right to share it with others.
 20 Further, there appears to be no reasonable means for Defendants to remove the offending
 21 statements as they do not control the website where they are presented. This Court therefore
 22 denies the motion for preliminary injunction.

23 **C. Plaintiff's Motion to Dismiss Counterclaim of Defendants Maldonado and
 24 Montgomery or in the Alternative for a More Definite Statement (ECF No. 12)**

25 Plaintiff moves to dismiss Defendants' counterclaims pursuant to Rule 12(b)(6). (Mot. to
 26 Dismiss, ECF No. 12 at 2). Plaintiff specifically moves to dismiss Defendants' Amended

27 ⁷ In its reply, Plaintiff argues that if the policy of the RipoffReport website is to refuse to remove materials posted by
 28 users, the Court could fashion an appropriate equitable relief such as requiring Defendants to post retractions,
 disclaimers or apologies. (ECF No. 18 at 7).

1 Answer and Counterclaim filed on December 6, 2010 (ECF No. 1-6). *Id.* at 2. On January 8,
2 Defendants filed a motion to amend/correct their amended answer and counterclaim.
3 (Mot. to Amend, ECF No. 17). On January 26, 2011, Judge McQuaid granted Defendants' motion to amend and granted Defendants leave to serve and file the second amended answer and counterclaim. (Order, ECF No. 24). On January 28, 2011, Defendants filed their Second Amended Answer and Counterclaim with this Court. (Second Am. Answer, ECF No. 25). This Court denies Plaintiff's motion to dismiss the first amended answer and counterclaim as moot because that pleading is no longer operative.

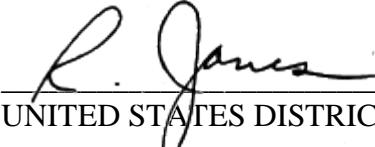
9 **IT IS THEREFORE ORDERED** that Defendants' motion to dismiss for lack of
10 personal jurisdiction and improper venue or to transfer (ECF No. 5) is **DENIED**.

11 **IT IS FURTHER ORDERED** that Plaintiff's motion for preliminary injunction
12 (ECF No. 7) is **DENIED**

13 **IT IS FURTHER ORDERED** that Plaintiff's motion to dismiss the
14 counterclaims or, in the alternative, for a more definite statement (ECF No. 12) is **DENIED**.

15 **IT IS SO ORDERED.**

17 DATED: This **30th** day of March, 2011

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UNITED STATES DISTRICT JUDGE